Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

ANTHONY M. DEMARIA and KATHY L. DEMARIA, husband and wife; TONY DEMARIA, JR.; and JOHN JOSEPH DEMARIA, by and through ANTHONY M. DEMARIA, Guardian Ad Litem,

Petitioners,

v.

WASHINGTON COUNTY; WASHINGTON COUNTY BOARD OF COMMISSIONERS DON STEPHENS, MILDRED HORTON, RONALD POUND; SHERIFF'S DEPARTMENT OF WASHINGTON COUNTY; JIM NELSON AND MICHAEL WADLEY; and JOHN DOES 1 THROUGH 10,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This is a civil rights action brought pursuant to 42 U.S.C. §§ 1983, 1985, and 1986, seeking monetary damages for the alleged violation of Petitioners' (collectively "DeMarias")[1] Fourteenth Amendment rights. The alleged violation of rights stems from a fight which occurred between some of the DeMarias and their neighbors (collectively "Sorensons")[2] on March 27, 1993.

DeMarias sued Respondents (collectively "Washington County"),[3] asserting that despite Washington County's prior knowledge of problems between DeMarias and Sorensons, Washington County did nothing to protect DeMarias. DeMarias assert that Washington County had a duty to protect them from Sorensons.

Washington County moved for summary judgment on the basis that under *DeShaney v. Winnebago Soc. Serv.*, 489 U.S. 189 (1989), it owed no duty to protect DeMarias from Sorensons. The District Court granted Washington County summary judgment. Relying upon *DeShaney*, the District Court held Washington County's alleged acquiescence in the dispute did not create the danger DeMarias faced. Therefore, Washington County owed no duty to

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[1] Petitioners are Anthony M. DeMaria, Kathy L. DeMaria, Tony DeMaria, Jr., and John Joseph DeMaria, by and through Anthony M. DeMaria, Guardian Ad Litem.

[2] The neighbors were Tom Sorenson and Kevin Sorenson. Sorensons are not parties to this litigation.

[3] Respondents are Washington County; Washington County Board of Commissioners Don Stephens, Mildred Horton, Ronald Pound; Sheriff's Department of Washington County; Sheriff Michael Wadley; and undersheriff Jim Nelson.

protect DeMarias from Sorensons. Petition for Writ of Certiorari, Appendix B, pp. 13-17. A Ninth Circuit panel affirmed. *Id.*, Appendix A. A Petition for Rehearing was denied and *no* Ninth Circuit judge requested a vote on a suggestion for rehearing *en banc*. *Id.*, Appendix D. Petitioners seek a writ of certiorari from the Ninth Circuit's decision.

A.

STATEMENT OF FACTS

The March 27, 1993, fight resulted from an impromptu event between neighbors who apparently detested each other. Tony DeMaria, Jr., was in a vehicle proceeding toward the DeMaria home in Weiser, Idaho. Tom Sorenson was driving a vehicle in the opposite direction. When the two vehicles passed each other, Tom Sorenson raised his fist at Tony DeMaria, Jr. Tony DeMaria, Jr., "flipped off" Tom Sorenson. Tom Sorenson turned his vehicle around and followed Tony DeMaria, Jr., to DeMarias' house where the fight broke out. The fight eventually included as participants three DeMarias and Sorensons.

Washington County law enforcement officers investigated the fight. Four days later, the county prosecutor charged Kevin Sorenson with a felony and charged Tom Sorenson with two misdemeanors. The criminal charges against Kevin Sorenson resulted in a plea agreement which reduced his charge to misdemeanor battery. He pled guilty. Tom Sorenson had a jury trial with the jury finding him guilty of disturbing the peace.

While DeMarias' claim arises from the fight of March 27, 1993, the gravamen of their Complaint concerns events which preceded the fight. DeMarias now[4] characterize the critical pre-fight facts as follows: Their neighbors verbally harassed and threatened them. Petition for Writ of Certiorari, p. 8. Washington County took "no action" against the neighbors. *Id.* Instead, Washington County "fraternized" and "encouraged" Sorensons. *Id.* The sheriff purportedly told Anthony DeMaria that the sheriff's office would not protect him and did not want him in the community. *Id.* After the March 27, 1993, fight, DeMarias state the sheriff's department's investigation was biased.[5] *Id.*, at 10. Further, Washington County continued to "celebrate and fraternize" with Sorensons. *Id.*

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[4] DeMarias' characterization of the facts has grown, as has their imagination, as time has passed. *See*, for example, the District Judge's characterization of the new allegations in DeMarias' Amended Complaint. Petition for Writ of Certiorari, Appendix B, p. 11 and pp. 12-13. As further example, DeMarias' counsel was asked at oral argument before the Ninth Circuit panel to support assertions made in DeMarias' briefing. Counsel was not able to do so. Many of the allegations made in the Petition before this Court are the same as were made to the Ninth Circuit. DeMarias' characterization of the facts should be viewed skeptically. The District Court's factual findings are more accurate. *Id.*, Appendix B, pp. 6-8. In any event, even DeMarias' most recent factual account in the Petition does not warrant the imposition of a duty to protect under *DeShaney*.

[5] If the investigation was biased, why did it result in charges being brought against Sorensons?

B.

PROCEEDINGS AND DISPOSITION IN LOWER COURTS.

The course of proceedings is remarkable in that six different federal judges have considered DeMarias' allegations and determined Washington County owed no duty to protect DeMarias from their neighbors. DeMarias' Complaint was filed June 29, 1993. Washington County immediately moved to dismiss the Complaint on the basis that under the facts alleged it had no affirmative duty under the Fourteenth Amendment to protect DeMarias from their neighbors. A magistrate judge heard and decided Washington County's Motion to Dismiss. The Magistrate Judge recommended that the Motion to Dismiss be granted as to the § 1983 claims; but the Magistrate allowed DeMarias ten days within which to amend their Complaint as to the § 1985 and § 1986 claims.

Since DeMarias objected to the Magistrate's Report and Recommendation, a United States District Judge reviewed the Report and Recommendation. He dismissed the Complaint and allowed DeMarias 20 days to file an amended complaint. The dismissal was granted on the basis that Washington County did not owe DeMarias a duty under the Fourteenth Amendment to protect them from their neighbors. The District Court did permit DeMarias to file an amended complaint because he could envision circumstances where a cause of action under § 1983 and § 1985 could be alleged.

DeMarias filed an Amended Complaint. The gist of the new allegations in the Amended Complaint was that Washington County "affirmatively placed" DeMarias in a

position of danger by communicating to local law enforcement and DeMarias' neighbors that DeMarias' complaints would not be investigated and DeMarias would not be protected from their neighbors. Washington County filed a Motion for Summary Judgment. The Motion again raised the issue of Washington County's duty to protect DeMarias from their neighbors. DeMarias waited until two days before the hearing to file an opposing memorandum and affidavits. The hearing was rescheduled. One-half hour before the second hearing, DeMarias filed yet another affidavit. Washington County moved to strike blatant hearsay from DeMarias' affidavits and moved to strike one affidavit because it was untimely.

The United States District Judge, the third federal judge to consider DeMarias' allegations, granted the Motion for Summary Judgment and granted the Motion to Strike. The District Judge concluded that under *DeShaney* there was no duty owed by Washington County to protect DeMarias from Sorensons. Moreover, the District Court held that to the extent DeMarias' Amended Complaint could be construed to include an Equal Protection Claim, the claim was waived and/or there was no competent evidence to support it. Finally, in granting the Motion to Strike, the District Judge struck the hearsay statements and the untimely filed affidavit.

DeMarias filed two Motions for Reconsideration. One Motion addressed the propriety of granting summary judgment. The other Motion addressed the propriety of granting the Motion to Strike. For relief, DeMarias, in part, sought to continue the hearing on the Motion for

Summary Judgment to develop new evidence. The Court denied the Motions to Reconsider.

DeMarias filed a Notice of Appeal. The Ninth Circuit panel affirmed summary judgment on the basis that DeMarias could not demonstrate facts warranting imposition of a duty to protect under the Fourteenth Amendment. Petition for Writ of Certiorari, Appendix A, p. 3. The panel held neither DeMarias nor Sorensons were within the control of Washington County. Further, there was no evidence that Washington County told Sorensons that DeMarias would go unprotected. *Id.* Moreover, the Ninth Circuit panel held the District Court did not abuse its discretion in striking rank hearsay from DeMarias' affidavits, in striking the untimely filed affidavit, in denying an untimely Motion under Federal Rule of Civil Procedure 56(f) for additional time, and in denying the Motions to Reconsider. *Id.*, at pp. 3-5. DeMarias' Motion for Reconsideration With Suggestion for Rehearing En Banc was denied. No Ninth Circuit Judge requested a hearing on the suggestion for rehearing *en banc*. *Id.*, Appendix D, p. 31.

Thus, six federal judges have now considered DeMarias' claims and have unanimously held that DeMarias' facts are not sufficient to rise to the level of creating a duty to protect under *DeShaney*.

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari, which addresses the Fourteenth Amendment Due Process Claim,[6] should be denied because:

1. The issue presented is not sufficiently important to warrant this Court's review. In *DeShaney*, this Court held that a governmental actor, except under limited circumstances, owes no duty under the Due Process Clause to protect one citizen from the actions of another. Since *DeShaney*, numerous petitions for writ of certiorari have been sought from cases addressing the parameters of this Court's holding. All of the petitions have been denied. There is nothing about DeMarias' Petition that warrants different treatment.

2. Contrary to Petitioners' arguments, there is no conflict between the Second, Eighth, and Ninth Circuits on the particular issue raised. The legal rule applied in

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[6] The Petition also raises "procedural and evidentiary" questions which it asks this Court to consider *if* the Petition is granted. Petition for Writ of Certiorari, p. 19. Since the pending question is whether the Court will exercise its discretion to grant certiorari, Washington County is addressing only the Due Process Claim in this Brief. Had DeMarias independently sought certification as to the procedural and evidentiary questions, those questions would not present important matters. Rather, those questions assert error amounting to erroneous factual findings or abuse of judicial discretion. Thus, the questions do not justify this Court's review. Supreme Court Rule 10. In addition, for purposes of this Brief Washington County adopts the reasoning of the District Court and the Court of Appeals as to those issues. Petition for Writ of Certiorari, Appendices B and A, respectively.

each Circuit is the same. What DeMarias actually challenge is the application of their facts to the correctly stated law. The Ninth Circuit correctly applied *DeShaney* to hold that Washington County owed no duty to protect DeMarias under the facts of this case.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE ISSUE PRESENTED IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW.

Following the seminal *DeShaney* decision, this Court has been asked to review numerous Circuit Court rulings applying *DeShaney*. Certiorari has been denied in each instance. There is nothing about this Petition which warrants different treatment.

In *DeShaney*, this Court held that the Due Process Clause does not impose upon government the obligation to protect its citizens from each other.

> . . . [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security.

489 U.S. at 195.

The holding was applied to a factual scenario this Court described as tragic. *Id.* at 191. For over two years

governmental employees were aware that Joshua DeShaney was being abused by his father. *Id.* at 192-193. When he was four years old, his father beat him so severely that he fell into a life-threatening coma. *Id.* He and his mother sued the governmental employees involved, alleging that Joshua's due process rights were violated by the State actors' failure " . . . to intervene to protect him against a risk of violence at his father's hands of which they knew or should have known." *Id.* at 193. This Court rejected the claim. " . . . [W]e conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197.

This Court went on to address Joshua's argument that a "special relationship" was created when the State, knowing of Joshua's circumstances, attempted to protect him. So, the argument went, when the State failed to protect him, a substantive Due Process Claim arose. *Id.* at 197. This Court rejected the argument. It limited the "special relationship" argument to "the limited circumstances" when a " . . . state takes a person into its custody and holds him there against his will. . . . " *Id.* at 199-200. The Court reasoned:

> *The affirmative duty to protect arises* not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but *from the limitation which it has imposed on his freedom to act on his own behalf.*

Id. at 200 (emphasis added).

The Court rejected Joshua's "special relationship" argument on the basis that he was not in the custody of

the State at the time of his injuries. The State had not limited his freedom to act on his own behalf. In that context – that Joshua was not in the State's custody – the Court made a one-sentence statement which has become the genesis in the Courts of Appeal for the so-called "danger creation" exception to *DeShaney*. The Court said:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them.

Id. at 201.

As noted, since *DeShaney* the Courts of Appeal have interpreted the above-quoted language as recognizing circumstances when a governmental entity may have a duty to protect one citizen from another, i.e., when the governmental actor created the danger. For example, the Ninth Circuit has identified two elements for application of the danger creation exception: (1) the government entity acted with deliberate indifference, and (2) the government entity's affirmative conduct placed the plaintiff in a position of danger. *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938 (1990); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993), *on remand*, 92 F.3d 894 (9th Cir. 1996).

The inquiry – whether the government actor's affirmative conduct is sufficient to create a danger and a corresponding duty to protect – is by definition a factual one. The focus is upon the governmental actor's affirmative conduct. What did the governmental actor do? If he

acted, is the affirmative conduct sufficient to create a danger?

Numerous cases have addressed these questions. Certiorari has been sought several times and in each instance, this Court has denied the petition.[7] DeMarias' Petition does not warrant this Court's review any more than any prior petition addressing these questions. The issue is not an important matter as required by Supreme Court Rule 10(a).

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[7] The following are recent representative cases in which this Court denied certiorari where the Court of Appeals addressed the duty to protect one citizen from another under the Due Process Clause: *Soto v. Flores*, 103 F.3d 1056 (1st Cir. 1997), *cert. denied*, ___ U.S. ___ (1997); *Mark v. Borough of Hatboro*, 51 F.3d 1137 (3rd Cir. 1995), *cert. denied*, 516 U.S. 858 (1995); *Pinder v. Johnson*, 54 F.3d 1169 (4th Cir. 1995), *cert. denied*, 516 U.S. 994 (1995); *Johnson v. Dallas Independent School Dist.*, 38 F.3d 198 (5th Cir. 1994), *cert. denied*, 514 U.S. 1017 (1995); *Reed v. Gardner*, 986 F.2d 1122 (7th Cir. 1993), *cert. denied*, 510 U.S. 947 (1993); *Gregory v. City of Rogers, Ark.*, 974 F.2d 1006 (8th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993); *L.W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992), *cert. denied*, 508 U.S. 951 (1993); *Uhlrig v. Harder*, 64 F.3d 567 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118 (1996); and *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066 (1990).

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THERE IS NO LEGAL CONFLICT BETWEEN THE SECOND, EIGHTH AND NINTH CIRCUITS ON THE PARTICULAR ISSUE RAISED. THE PETITION ACTUALLY CHALLENGES THE NINTH CIRCUIT'S CORRECT APPLICATION OF *DeSHANEY*.

The Petition states that there is an "apparent conflict" in the Second, Eighth and Ninth Circuits in the "construction and application" of the phrase "ratify, condone or in any way instigate" as that term has been applied to the danger creation exception. Petition for Writ of Certiorari, p. 20. A careful reading of the Petition reveals that there is no legal conflict. Actually, DeMarias want this Court to review the factual findings and apply those findings differently than did the Ninth Circuit. At best, DeMarias argue a misapplication of a correctly stated rule of law.

DeMarias do not identify legally inconsistent positions in the three Circuits. In fact, while they refer to an "apparent conflict" (Petition for Writ of Certiorari, p. 18), Petitioners make repeated reference to the commonality in legal approaches taken by the three Circuits. For instance, DeMarias criticize the District Court for failing to " . . . apply language from post-*DeShaney* decisions in the Ninth and other Circuits which define and elaborate the 'danger creation' exception. . . . " Petition for Writ of Certiorari, at p. 21. The Petition continues, "*These cases* suggest that plaintiffs may preserve due process claims . . . if they plead . . . that defendants . . . did 'anything' to 'ratify, condone or in any way instigate' the abuses of the private actor." *Id.* (emphasis added). DeMarias then cite

as authority cases from the Second Circuit, *Dwares v. City of New York*, 985 F.2d 94 (2nd Cir. 1993), the Eighth Circuit, *Freeman v. Ferguson*, 911 F.2d 423 (8th Cir. 1990), and the Ninth Circuit, *Balistreri v. Pacifica Police Department*, 901 F.2d 696 (9th Cir. 1990).[8] Thus, DeMarias acknowledge that the law in the three Circuits is consistent.

What is clear from reading the Petition is that DeMarias are dissatisfied with the "application and construction" of consistent law in the Circuits. They do not challenge the rule of law which they contend has developed in the three Circuits. At best, they are arguing a misapplication of a properly stated rule.[9] Such an argument does not warrant this Court's consideration. Supreme Court Rule 10.

Under the guise of a conflict in the law in three Circuits, DeMarias actually are asking this Court to review a properly and fairly decided matter. DeMarias' evidence clearly brought their case within *DeShaney's* holding that governmental actors owe no duty to protect one citizen from another.

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[8] DeMarias make further reference to the consistency of the cases from the three Circuits: " . . . *Balistreri* and its progeny in the other Circuits . . . ," *Id.* at 22; "*Freeman* and *Dwares* each develop and apply the language propounded by the Ninth Circuit in *Balistreri* . . . ," *Id.* at 24; and " 'ratify' or 'condone' which *Freeman* and *Dwares* borrowed from *Balistreri.*" *Id.* at 25-26.

[9] The *Dwares* and *Freeman* cases, upon which DeMarias so heavily rely, are not legally inconsistent with Ninth Circuit precedent. But, the cases are factually distinguishable from DeMarias' case. *See*, the District Court's discussion of those cases. Petition for Writ of Certiorari, Appendix B, pp. 16-17.

There is no dispute that the fight that erupted on March 27, 1993, was an impromptu event between neighbors who had a history of not getting along with each other. Moreover, there is no dispute that Washington County was not present during the fight. DeMarias' evidence focuses upon Washington County's failure to intervene to prevent the neighbor's dispute.[10]

Washington County's purported failure to intervene and stop the neighbor's from harassing each other is virtually identical to the conduct of the Department of Social Services in *DeShaney*. In *DeShaney*, it was alleged that the State had knowledge of Joshua's abuse for two years. During that two years, the State had acted to protect him. It had investigated Joshua's abuse on several occasions, removed Joshua from his father's home, returned him to his father's care, imposed counseling requirements on Joshua's father, and imposed monthly social worker contact at Joshua's home. Despite the State's contact with Joshua, and its failure to intercede on his behalf, the Court held there was no duty to protect him from his father. That was so because the State only has a duty to protect when it imposes a limitation on the

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[10] DeMarias have over time made scandalized accusations to enlarge Washington County's role in the fight. *See*, Petition for Writ of Certiorari, Appendix B, pp. 12-13. The allegations have never been supported by competent evidence. Furthermore, DeMarias offered rank hearsay to support their Equal Protection Claim. The hearsay was appropriately stricken. *Id.* at pp. 18-20. Thus, despite DeMarias' attempts to expand Washington County's role, they have never offered competent evidence to support those allegations.

ability of the individual to act on his own behalf. *DeShaney, supra,* at 200.[11]

The District Court granted summary judgment to Washington County because Washington County did nothing to limit DeMarias' ability to act on their own behalf. As stated by the District Judge:

> Assuming that the DeMarias' allegations are true, they do not rise to the level required by the Due Process Clause. Nothing in the record indicates that the Defendants affirmatively created any dangerous situation. The danger was affirmatively created by Sorensons. The DeMarias were never dependent and helpless. Assuming that Sheriff Wadley and Deputy Nelson ignored the DeMarias' pleas for help, their passivity is not the "affirmative creation of a dangerous situation" required by the case law.
>
> The DeMarias claim that Sheriff Wadley and Deputy Nelson affirmatively created a danger by letting the Sorensons get away with outrageous physical and verbal abuse, thereby essentially encouraging that abuse. But this argument flies in the face of *DeShaney*. The county defendant let the abusive father get away with multiple beatings of his child. Certainly, the abusive father could be said to have been emboldened by the county's "acquiescence-by-silence." But the Supreme Court dismissed the suit anyway, holding that the Due Process Clause was not violated when the "state functionaries . . . stood

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[11] This Court recently confirmed that *DeShaney* limits the duty to protect to circumstances where the victim is in the State's custody. *United States v. Lanier,* 520 U.S. 259 (1997).

> by and did nothing when suspicious circumstances dictated a more active role for them." *Id.* at 203.

Petition for Writ of Certiorari, Appendix B, pp. 15-16.

In affirming the District Court, the Ninth Circuit panel correctly held that Washington County did not exercise control over DeMarias or Sorensons. There was, therefore, no duty to protect. The Ninth Circuit panel applied the appropriate law to the facts found by the District Court. The decision was proper and fair based upon DeMarias' evidence.

Finally, it should be noted that DeMarias' argument is inconsistent with *DeShaney*. The gist of DeMarias' argument is that if a governmental actor does "anything" to "ratify, condone or in any way instigate" the actions of one citizen against another, the governmental actor is liable. Petition for Writ of Certiorari, pp. 20-26.

DeMarias' position cannot be reconciled with *DeShaney*. As noted above, the governmental actors in *DeShaney* were actively involved in investigating allegations of abuse by Joshua's father, including, removing Joshua from his father's care, imposing counseling requirements on Joshua's father, and imposing monthly contact by a social worker. DeMarias' argument would impose liability on the State actors in *DeShaney* since they did "something" to "instigate" Joshua's abuses. Clearly, DeMarias' argument flies in the face of *DeShaney*.

CONCLUSION

The Petition for Writ of Certiorari should be denied since it does not present an important matter; it does not present a conflict of laws in the Circuits; and the Ninth Circuit Court of Appeals properly and fairly decided the appeal.

Respectfully submitted this 16th day of June, 1998.

Respectfully submitted,

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